No. 80-1335

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL I. SELZER,

Petitioner,

vs.

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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April 17, 1981

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REPLY BRIEF

1. Respondents' interpretation of Interrogatory 3(a) (see Brief in Opposition pp. 5-6) is a transparent distortion. The phrase "that result" in Interrogatory 3(a) refers not simply to the denial of tenure and promotion, but to the wrongful denial of

tenure and promotion. This is obvious from a reading of Interrogatories 1 and 2 in conjunction with Interrogatory 3(a).*

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* Interrogatory 1 reads:

> Did plaintiff prove, by a preponderance of the evidence, that his association with the CIA was a substantial or motivating factor in the determination to deny plaintiff tenure or promotion?
>
> Yes X No _____

Interrogatory 2 reads:

> Did the defendants prove by a preponderance of the evidence that Michael Selzer would have been denied tenure or promotion even if his association with the CIA had not been considered?
>
> Yes _____ No X

Interrogatory 3(a) reads:

> If your answer to Interrogatory 1 is "Yes" and to Interrogatory 2 is "No", which, if any, of the following defendants knowingly acted in such a way as to cause, or contribute to the causation, of that result: [a list of the defendants, followed; the jury checked "Yes" as to each.]

2. Respondents argue that they cannot be held liable to petitioner unless their votes would have been affirmative had Selzer not talked to the CIA. That argument ignores the fact that evidence of non-voting conduct by each of the respondents amply supported the jury's conclusion that respondents' conduct had caused the institutional decision to be based upon impermissible factors. (See Petition pp. 5-8)

3. Respondents ignore the theory by which the Board of Higher Education ("BHE") should be held liable, namely, that the BHE is statutorily charged with making decisions on tenure and promotion. Where the institutional decisions are found to have deprived a plaintiff of his constitutional rights, the BHE is liable. Interrogatories 1 and 2 establish the wrongfulness of the

institutional decisions. Although the BHE delegated the making of those decisions, it cannot thereby avoid liability if those decisions violate § 1983; Owen v. City of Independence, 445 U.S. 522 (1980), makes the BHE strictly liable. That "there was no policy, practice or regulation concerning a faculty member's association with the C.I.A. promulgated by the BHE" (Brief in Opposition p. 10) is irrelevant.*

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* The absence of a cross-appeal is likewise irrelevant. Since petitioner simply sought affirmance of his judgment against the BHE, a cross-appeal would have been improper. Also irrelevant is the BHE's motivation for being substituted as judgment debtor; contrary to respondents' suggestion (Brief in Opposition p. 11), a judgment is not a contract of indemnity.

CONCLUSION

Petitioner Michael I. Selzer respectfully submits that, for the reasons stated above and in the Petition herein, a Writ of Certiorari should be granted and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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